ANG CHEE HUAT

v.

THOMAS JOSEPH ENGELBACH

COURT OF APPEAL, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM JCA,
DATO' MAHADEV SHANKAR JCA,
DATO' HJ. ABU MANSOR B. ALI JCA
[CIVIL APPEAL NO. J-02-141-94]
20 MARCH 1995

***INJUNCTION**: Mareva injunction - High Court ordering Mareva injunction against appellant - Whether there was a real risk of assets being dissipated or removed - Whether the three essential elements considered - Appellant executing a declaration of trust - Whether appellant a trustee of respondent - Conduct of appellant - Whether a relevant factor.*

The respondent is a foreigner and a close friend of the appellant. In 1988, Elastomers Limited, a company in which the respondent was a director, was considering locating its plant in Johor Bahru. The respondent sought the assistance of the appellant for this purpose, and the appellant advised incorporation of a local company and recommended a local accountant. The respondent paid the appellant RM500,000 on the alleged false representation of the appellant that MIDA required a deposit in a Malaysian bank to obtain pioneer status for the local company to be incorporated. The said sum was not put in a fixed deposit account but the appellant misled the respondent that it was so.

The respondent also alleged that the appellant had falsely represented that he had bought land held under H.S.(D) 6373 Lot No. 4170 Mukim Tebrau, District of Johor Bahru registered under Sepi Sdn. Bhd. for RM2.1 million, to be owned jointly by them, and that the RM500,000 had been utilised as part payment of the purchase price. The respondent alleged that since he was a foreigner, the land had been registered in the sole name of the appellant. The appellant executed a declaration of trust constituting himself as trustee of undivided half share of the land in favour of the respondent.

The respondent sued for the loss of RM500,000 and consequent damages and sought a Mareva injunction by way of *inter partes* summons in chambers against the appellant's half share in land held under H.S.(D) 40767 Lot No. PTD 18779 with a building erected thereon known as 270, Jalan Serampang, Pelangi, Johor Bahru and shares of RM210,000 in Sepi Sdn Bhd., in which the appellant was a shareholder and director.

The learned Judicial Commissioner allowed the Mareva injunction on the grounds that:

(i) the respondent had shown a good arguable case;

(ii) the assets of the appellant were within the jurisdiction;

(iii) there was a real risk that the appellant will or may dispose of his assets within jurisdiction.

The appellant appealed to the Court of Appeal.

Held:

Per Zakaria Yatim JCA (Hj. Abu Mansor Ali, Mahadev Shankar JJCA, concurring):

[1] The learned Judicial Commissioner has considered the three essential requirements for granting a Mareva injunction. The respondent has shown that he has a good arguable case in respect of his claim for the return of the RM500,000 and it is not in dispute that the assets of the appellant is within the jurisdiction i.e. the appellant is the registered owner of an undivided half share of land comprised in H.S.(D) 40767 Lot No. PTD 18779 together with a building erected thereon and the results of a search at the Registry of Companies shows that the appellant owns 210,000 shares in Sepi Sdn Bhd.

[2] The declaration of trust is undated and referred to a different lot number and land area. There is, moreover, some doubt as to its authenticity. The learned Judicial Commissioner made a finding that the appellant's conduct showed that he was a trustee who intended to default and would do what he could to avoid having to meet his obligations. Furthermore, the appellant's letter dated 20 November 1990 to the respondent revoking the declaration of trust only served to confirm that his actions were akin to a long term fraud by the build-up of confidence to be followed by default. The conduct of the appellant lacked probity and honesty.

[3] In the circumstances, there is a real risk that the assets of the appellant will dissipate should the respondent succceed at the trial.

Held:

Per Hj. Abu Mansor bin Ali JCA:

The learned Judicial Commissioner had correctly considered all ingredients before granting the Mareva injunction, the most important of which was whether there was any real danger of the assets being dissipated. There was such a danger as the appellant by his conduct was already leading to that trend. Accordingly this appeal is dismissed with costs.

[Appeal dismissed with costs].

[Bahasa Malaysia Translation of Headnote**]**

***INJUNKSI**: Injunksi Mareva - Mahkamah Tinggi memerintah injuksi Mereva terhadap perayu - Samada wujud risiko sebenar bahawa aset akan hilang atau dialih - Samada ketiga-tiga unsur penting dipertimbang - Perayu memeterai perisytiharan amanah -Samada perayu pemegang amanah responden - Tingkahlaku perayu - Samada satu faktor relevan.*

Responden adalah seorang warga asing dan sahabat karib perayu. Pada akhir 1988, Elastomers Limited, sebuah syarikat dimana responden menjadi pengarah, bercadang untuk mendirikan kilang di Johor Bahru. Responden mendapatkan khidmat perayu untuk tujuan ini, di mana perayu menasihatkan supaya sebuah syarikat tempatan diperbadankan dan mencadangkan seorang akauntan tempatan. Atas representasi perayu, yang dikatakan palsu, bahawa pihak MIDA memerlukan suatu deposit diletakkan di dalam bank di Malaysia untuk mendapatkan status perintis bagi syarikat berkenaan, responden membayar kepada perayu sebanyak RM500,000. Wang tersebut tidak dimasukkan kedalam mana-mana deposit tetap tetapi perayu mengelirukan responden dengan mengatakan demikian.

Responden juga mengatakan bahawa perayu telah membuat representasi palsu bahawa beliau (perayu) telah membeli sebidang tanah yang dipegang dibawah H.S (D) 6373 Lot No. 4170 Mukim Tebrau, Johor Bahru yang didaftar di atas nama Sepi Sdn Bhd dengan harga RM 2.1

juta, yang akan dimilikki bersama di antara mereka, dan bahawa wang sebanyak RM500,000 itu telah digunakan untuk membayar sebahagian daripada harga belian. Responden menyatakan bahawa oleh kerana beliau seorang warga asing tanah tersebut telah didaftarkan di bawah nama perayu seeorang. Perayu memeterai satu perisytiharan amanah menyatakan bahawa dia memegang setengah bahagian tanah tersebut bagi pihak responden.

Responden menuntut kerana kehilangan RM500,000 dan kerugian yang berkaitan, dan melalui saman dalam kamar *inter partes*, memohon injunksi Mareva terhadap setengah bahagian tanah milik perayu yang dipegang di bawah H.S (D) 40767 Lot No. PTD 18779 di mana terdapat di atasnya bangunan beralamat 290, Jalan Serampang, Pelangi, Johor Bahru, serta terhadap saham bernilai RM210,000 di dalam Sepi Sdn Bhd di mana perayu adalah seorang pemegang saham dan pengarah.

Yang Arif Pesuruhjaya Kehakiman membenarkan injunksi Mareva atas alasan bahawa:

(1) responden telah membuktikan kes yang kuat dan boleh dihujah;

(2) aset perayu berada di dalam bidang kuasa;

(3) wujud risiko sebenar bahawa perayu akan melupuskan asetnya yang berada di dalam bidangkuasa.

Perayu merayu kepada Mahkamah Rayuan.

Diputuskan:

Zakaria Yatim HMR (Hj. Abu Mansor bin Ali, Mahadev Shankar HHMR bersependapat):
[1] Yang Arif Pesuruhjaya Kehakiman telah mempertimbang ketiga-tiga unsur penting bagi membenarkan suatu injunksi Mareva. Responden telah menunjukkan bahawa beliau mempunyai kes yang baik dan boleh dihujah berhubung dengan tuntutannya supaya dikembalikan wang sejumlah RM500,000, dan adalah tidak dinafi bahawa aset perayu berada dalam bidangkuasa, yakni perayu adalah pemilik berdaftar kepada setengah bahagian tanah yang dipegang di bawah H.S.(D) 40767 Lot. No.18779 bersama dengan sebuah bangunan di atasnya. Keputusan penyelidikan dengan Pendaftar Syarikat juga menunjukkan bahawa perayu memiliki 210,000 saham di dalam Pegi Sdn Bhd.

[2] Perisytiharan amanah tersebut tidak berharibulan dan merujuk kepada nombor lot dan kawasan tanah yang berbeza. Lagi pun terdapat kekaburan tentang kesahihannya. Yang Arif Pesuruhjaya Kehakiman membuat keputusan bahawa tingkah laku perayu menunjukkan bahawa beliau adalah pemegang amanah yang bercadang untuk ingkar dan akan membuat apa yang terdaya untuk mengelak dari memenuhi obligasinya. Lagipun surat perayu bertarikh 20 November 1990 kepada responden memansuhkan perisytiharan amanah mengesahkan bahawa tindakan-tindakannya adalah bersesuaian dengan penipuan yang berpanjangan dengan cara membina keyakinan dan kemudian mengingkarinya. Tidak ada kejujuran dalam kelakuan perayu.

[3] Dalam halkeadaan ini, wujud risiko sebenar bahawa aset perayu akan lesap jika responden berjaya dalam kesnya.

Oleh Haji Abu Mansor Ali HMR:

Yang Arif Pesuruhjaya Kehakiman telah mempertimbang dengan betulnya kesemua ingredien sebelum membenarkan injunksi Mareva, ingredien mana, yang termustahak, ialah samada wujud bahaya sebenar bahawa aset berkenaan akan lesap. Bahaya in wujud oleh kerana

perilaku perayu sudah pun menjurus ke arah kecenderungan sedemikian. Dengan itu rayuan ini ditolak dengan kos.

[Rayuan ditolak].

Cases referred to:
Creative Furnishing Sdn. Bhd. v. Wong Koi [19891 2 MLJ 153 ***(refd)***
Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd. [1984] 2 MLJ 143 ***(refd)***
Petowa Jaya Sdn. Bhd. v. Binaan Nasional Sdn. Bhd. [1988] 2 MLJ 261 ***(foll)***
Amixco Asia v. Bank Negara Indonesia 1946 [1992] 2 SCR 305 ***(refd)***

For the appellant - Wu Tern Yue (Hua Kia Fook with him); M/s. K.F. Hua & Partners.
For the respondent - Jeyakumar; M/s. Reginald Vallipuram & Co.

JUDGMENT

Dr. Zakaria bin Mohd Yatim JCA:

This is an appeal against the decision of Mohd. Ghazali bin Mohd Yusoff JC, who made an order on 6 August 1994 granting a Mareva injunction against the defendant. He made the order after hearing the plaintiff's application by summons in chambers *interpartes*.

The respondent is a foreigner who resides at No. 100, Clark Street, Keyport, New Jersey, the United States. The appellant's last known address is at No. 270, Jalan Serampang, Pelangi, Johor Bahru.

The following facts are not in dispute. For some years prior to 20 June 1989 the appellant and the respondent were good friends. They visited each other at their respective homes and travelled overseas together. In late 1988, Elastomers Limited, a company of which the respondent is a director, was considering locating its plant in Johor Bahru. The company is carrying on the business of selling sealants. The respondent sought the assistance of the appellant to find a suitable location for his company's plant in Johor Bahru. The appellant advised the respondent to incorporate a local company in Johor Bahru. The respondent sought the appellant's assistance to find an accountant to set up the local company. On the appellant's recommendation, Messrs. Lau & Co. (now known as Messrs. Park & Associates) was appointed by the respondent. Early in 1989 the appellant arranged for the respondent to meet the assistant director of the Malaysian Industrial Development Authority (MIDA) in Johor and thereafter the respondent began to collect some data that was necessary to meet the requirements of MIDA. The respondent contends that the appellant advised him that it would be beneficial for him to obtain pioneer status for the company. The appellant and the respondent went around to look for a suitable piece of land to set up the respondent's factory. The land known as HS(D) 6373, Lot No. 4170 Mukim Tebrau, District of Johor Bahru was at one point of time registered In the name of Sepi Sdn Bhd, a company in which the appellant is a shareholder and director. The appellant encashed cheques given to him by the respondent totalling RM500,000. The appellant also signed an undated declaration of trust. The appellant is the registered owner of an undivided half share of all that piece of land comprised in HS(D) 40767, known as Lot No. PTD 18779 together with a building erected thereon known as No. 270, Jalan Serampang, Pelangi, Johor Bahru, which is the appellant's place of residence and which is the subject of the Mareva order. The appellant is also the registered owner of RM210,000 shares in Sepi Sdn. Bhd., the shares are also the subject matter of the Mareva order.

The disputed facts are as follows:

The respondent alleges in the statement of claim that the appellant had induced him to part with the sum of RM500,000 to the appellant by making a representation to him that in order for the appellant to obtain pioneer status from the company to be incorporated, MIDA had to be satisfied that Elastomers had a deposit of RM500,000 in a Malaysian Bank. The appellant made the representation orally to the plaintiff on 15 May 1989. The respondent contends that the said representation was false and untrue and that MIDA did not impose such requirement. By means of the said representation the respondent did cause to be handed over to the appellant to be kept on fixed deposit in an account with a Malaysian bank a sum of RM500,000. The said sum of RM500,000 was not put in a fixed deposit account by the appellant although the appellant had misled the respondent into believing that the appellant had done so as he remitted to the respondent in the United States some monies as purported interest derived on the safe deposit account. The respondent further alleges that the appellant falsely represented to him that the appellant had bought a piece of land known as HS(D) 6373, Lot No. 4170, Mukim Tebrau, District of Johor Bahru containing an area of 522,720 square feet to be owned jointly by the appellant and the respondent at the price of RM2.1 million and that the appellant had utilized the sum of RM500,000 given by the respondent to him as part payment of the purchase price. According to the respondent, the appellant informed him that the land the appellant had purchased had to be registered solely in the name of the appellant as the respondent was a foreigner. The appellant executed a declaration of trust constituting himself a trustee of undivided half share of the said land in favour of the respondent. The respondent alleges that the declaration of trust is null and void in that the defendant is not the registered owner of the land known as HS(D) 6373, Lot No. 4170 Mukim Tebrau. The respondent claims that he has lost the said sum RM500,000 and has suffered loss of damage.

The appellant in his statement of defence denies the respondent's allegations. He says that there was no agreement between them to buy a piece of land. He admits, however, that the land known as HS(D) 6373 for Lot 4170 was at one point of time registered in the name of Sepi Sdn. Bhd. in which he was a shareholder and director.

At the end of the *interpartes* hearing, the learned Judicial Commissioner allowed the respondent's application for a Mareva injunction subject to the usual undertaking as to damages. He granted the Mareva injunction on the grounds that:

(a) the plaintiff has shown that he has a good arguable case;

(b) that the assets of the appellant were within jurisdiction; and

(c) that there is a real risk that the appellant will or may dispose his assets within jurisdiction.

I think that the learned Judicial Commissioner has considered the three essential requirements for granting a Mareva injunction. See *Creative Furnishing Sdn. Bhd. v. Wong Koi* [19891 2 MLJ 153 @ 155; and *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 MLJ 143.

With regard to the requirement of a good arguable case, I am satisfied, after reading the pleadings and the affidavits, that the respondent has shown that he has a good arguable case in respect of his claim for the return of the RM500,000.

On the second requirement, the learned Judicial Commissioner considered that the requirement was not an issue as neither party had made any submission on that requirement before him. In any event one of his grounds for granting the order was that the assets of the appellant were within jurisdiction. It is not in dispute that the appellant is the registered owner of an undivided half share of all that piece of land comprised in HS(D) 40767 known as Lot No. PTD 18779 together with a building erected thereon known as No. 270, Jalan Serampang, Pelangi, Johor Bahru. A certified true copy of the search made at the Registry of Companies dated 5 April 1994, which is exhibited to the affidavit of Thomas Joseph Engelbach affirmed on 15 June 1994 and marked as TJE8 shows that the appellant owns 210,000 shares in Sepi Sdn. Bhd. The value of each share is RM1. This fact is not in dispute.

The next point is whether, on the evidence, there is a real risk of the assets being dissipated or removed. A declaration of trust is in respect of a piece of land under HS(D) 6373 for Lot No. 4170, Mukim Tebrau was signed by the appellant purportedly in the presence of an advocate and solicitor. The document is not dated. The declaration also states that the area of the land is approximately 522,720 square feet. According to the land title, a copy of which is exhibited to the plaintiff's affidavit, the lot number is 4173 and the area of the land is only 21,660 square feet. It is clear that the declaration of trust refers to a different lot number i.e. 4170 (and not 4073) and to a much larger land area i.e. 522,720 (and not 21,662). In paragraph 2 of the declaration of trust he claims to be the registered proprietor of the said land. But in the land title the registered proprietor of the said land was at all material times Sepi Sdn. Bhd. In his statement of defence, the appellant denies that he executed the declaration of trust. In paragraph 22 of his affidavit in reply, he however admits signing the document. He says that he does not know the person, Lee Fei Fung, who witnessed his signature. According to him the person who witnessed his signature was one Encik Mohd. Yassin bin Ibrahim. Encik Mohd. Yassin bin Ibrahim affirmed an affidavit on 8 June, 1994 and exhibited to that affidavit is the same declaration of trust. In that exhibit, the appellant's signature was, however, witnessed by Encik Yassin. It seems strange to me that the appellant's signature on declaration of trust, which is exhibited to the respondent's affidavit was witnessed by Mr. Lee Fei Fung whereas the document exhibited to Encik Mohd. Yassin's affidavit was witnessed by Encik Mohd Yassin. Mr. Lee Fei Fung in his affidavit affirmed on 8 June 1994 denies that the signature purported to be signed by Lee Fei Fung is his signature. It is significant to note that on 20 November 1990, the appellant wrote to the respondent, the following letter:

> Attn: Mr Engelbach Thomas Joseph
> 100 Clark Street
> Keyport, New Jersey 07735 USA
>
> Dear Sir,
>
> I refer to the declaration of trust made by me in your favour in respect of our joint intended acquisition of HS(D)6373 Lot No: 4170, Mukim Tebrau, Johor Bahru, Johor. As the aforesaid acquisition fails I am giving you this notice to confirm that the declaration therefore fails and of no effect as between us.
>
> Thank you.
>
> Yours faithfully,
>
> Sgd.
>
> Ang Chee Huat

In this letter he says that he has failed to acquire the said land but in the declaration of trust he states that he is the registered proprietor of the said land.

The learned Judicial Commissioner made the following finding in his grounds of judgment:

> ...it is my finding that the plaintiff has shown that there is a danger that the defendant's available assets will be dissipated to prejudice the plaintiff's claim ... To me his conduct shows that he is a trustee who intends to default and will do what he can to avoid having to meet his obligation ... The defendant's letter to the plaintiff dated 20 November, 1990, revoking the trust only serves to confirm that his actions are akin to a long term fraud by the build-up of confidence to be followed by default ... I have taken into account the defendant's evidence as well as the plaintiff and I cannot find anything to support his opposition to the application - there is solid evidence that the probity of the defendant cannot be called on.

I agree with the finding of the learned Judicial Commissioner. Having considered the evidence, I am of the view that the conduct of the appellant in this matter is lacking in probity and honesty. In the circumstances, I conclude that there is a real risk that the assets of the appellant will dissipate should the respondent succeed at the trial. I feel that I am justified in arriving at this conclusion in the light of the decisions in the following two cases: In *Petowa Jaya Sdn. Bhd. v. Binaan Nasional Sdn. Bhd.* [1988] 2 MLJ 261, Peh Swee Chin J, as he then was, said at page 264:

> The second condition laid down by Mustill J., duly approved by the Federal Court, was also satisfied, i.e. there was solid evidence that the probity of the defendant could not be relied on. The undisputed detention and use of the plaintiff's equipment, without the consent of plaintiff, and above all, the undisputed detention of 98% of progress payments No. 22 and 23, without paying the same to the plaintiff, would indicate that the probity of the defendant could not be relied on with regard to the agreed retention sum with which the Mareva injunction was concerned; in other words, the defendant would, far more probably than not, dissipate the agreed retaliation sum in question without paying it to the plaintiff, or dealing with it not for the purpose that was intended. The risk of dissipation was not just a mere possibility, but almost a certainty.

In *Amixco Asia v. Bank Negara Indonesia* 1946 [1992] 2 SCR 305, the Court of Appeal, Singapore decided that there was overwhelming objective evidence of *prima facie* dishonest conduct on the part of Amixco/Kosen/Quek, and in the full circumstances of the case a real risk of Amixco dissipating their assets to avoid satisfying BNI's judgment.

I respectfully agree with the passage in Peh Swee Chin J's judgment quoted above and with the decision of the Singapore Court of Appeal in *Amixco* case. For the reasons stated above, I dismissed the appeal with costs.

I am authorised by my learned brother, Dato' Mahadev Shankar, JCA to say that he concurs in this judgment.

Hj. Abu Mansor bin Ali JCA:

I have had the benefit of reading the judgment in draft of my brother Dato' Dr. Zakaria bin Mohd Yatim JCA. The facts of this case are as enumerated by him and are not in dispute. I agree with his decision that the appeal should be dismissed with cost, as the learned Judicial Commissioner Mohd Ghazali bin Mohd Yusoff had correctly considered all ingredients before granting the Mareva injunction, the most important of which was whether there was any real danger of the assets being dissipated. I agree with the answer found by him that there was such a danger as the appellant by his conduct was already leading to that trend. As I have said I concur and hereby dismiss this appeal with costs.